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CHARLES ELMORE C
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No. 378

In the Supreme Court

OF THE

United States

.....Term.....

JIMMIE BURNS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Ninth Circuit

BRIEF IN SUPPORT OF PETITION

OTTO CHRISTENSEN,
Broadway Arcade Building,
Los Angeles, California,
Attorney for Petitioner.

Los Angeles Review. Law Printers, 120 So. Spring St., Los Angeles. TU 1377

INDEX

	PAGE
Foreword	1
Opinion of Court Below	2
Statement of the Case	2
The Questions Presented	8

REASONS FOR GRANTING THE WRIT

I.

The Circuit Court of Appeals Has Decided a Question of Substance Relating to the Construction of a Statute of the United States Which Has Not Been, But Should Be, Settled by This Court 9

II.

The Circuit Court of Appeals Has Decided Important Matters Which Conflict with the Decisions of Other Circuit Courts of Appeals on the Same Matter 10

Certificate of Verification 12

SUPPORTING BRIEF

Jurisdiction	1
Statement	2
Specifications of Error	3

ARGUMENT

I.

One Who is Granted Probation During Compliance With Specified Terms and Conditions Has a Right to Notice of the Specific Charge of Violations Thereof and to a Hearing as to Whether or Not He Has Violated the Conditions Imposed, According to Some Well Recog-

PAGE

nized and Established Rules of Judicial Procedure, and Only After Such a Hearing Can the Probation Granted be Revoked, and Then Only for a Violation of the Law or of the Terms of the Order Granting Probation.. 3

II.

The Important Question of Whether or Not Probation Can be Revoked for Causes Other Than a Violation of the Terms of the Order Granting Probation Has Not Been, But Should Be, Passed Upon by this Court..... 9

Conclusion 11

CITATIONS AND AUTHORITIES IN SUPPORTING BRIEF

A. L. R., Vol. 54, 1471..... 5
Furrow v. U. S., 46 Fed. (2d) 647..... 5, 6
Hamm, Ex Parte, 24 N. M. 33, L. R. A., 1918-D, 694..... 11
Hollandsworth v. U. S., 34 Fed. (2d) 423, 427..... 4
Lucero, Ex Parte, 23 N. M. 433, L. R. A. 1918-C, 549..... 11
Riggs v. U. S., 14 Fed. (2d) 5..... 4
State v. Hardin, 183 N. C. 815, 818..... 10
State v. Miller, 122 S. C. 468..... 11
State v. Zolantakis, 259 Pac. 1044, 54 A. L. R. 1463..... 5, 10
U. S. v. Antinori, 59 Fed. (2d) 171, 172..... 11
U. S. v. Mulligan, 48 Fed. (2d) 93, 94..... 5
Williams v. State, 162 Ga. 815, 818..... 10

APPENDIX

Probation Act, 18 U. S. C. A., Secs. 724, 725, 727.

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To the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable, the Supreme Court of the United States:

Jimmie Burns, the above named petitioner, prays that a writ of certiorari be issued by this court to review a judgment of the Circuit Court of Appeals for the Ninth Circuit entered on the 20th day of June, 1932 (R. 91), affirming a judgment of the United States District Court for the Southern District of California, Central Division; and in this behalf petitioner respectfully shows:

Emphasis ours wherever used.

Opinion of Court Below

The opinion of the Court of Appeals was rendered on June 20th, 1932, and is reported in the record at pages 73-90.

Statement of the Case

1. The Circuit Court of Appeals affirmed the order of the trial court revoking a probationary order upon the suspended execution of a sentence of five years in the United States Penitentiary at McNeil Island, State of Washington, imposed on Count III of an indictment charging a violation of Section 3, Title II, of the *National Prohibition Act.*

2. The first count of the indictment charged a violation of Section 65 of the *Federal Penal Code;* the second count of the indictment charged a conspiracy to violate Section 3, Title II, of the *National Prohibition Act,* and Count III charged the violation of Section 3, Title II, of the *National Prohibition Act.*

On May 4th, 1931, the appellant was sentenced on his plea of guilty to imprisonment in the Los Angeles County Jail for a period of one year on the first count, fined $2000 on the second count, and that he "be imprisoned in the United States Penitentiary at McNeil Island, State of Washington, for the period of five years on the third count of the indictment"; execution of said sentence of imprisonment on the third count was suspended and probation granted for a period of five years, upon the condition that the petitioner "entirely refrains from any violation of any law, with the possible exception of park-

ing and traffic ordinances, and in all respects conduct himself as a law-abiding citizen" (R. 9).

The petitioner on, to-wit: the 11th day of May, 1931, was committed to the County Jail pursuant to the judgment and sentence imposed against him on Count I of the indictment, where he remained in the custody of the United States until the 21st day of January, 1932, when the trial court entered its order revoking the probation theretofore granted the petitioner on Count III of the indictment. A commitment issued in accordance with the original sentence, pursuant to which the petitioner was forthwith committed to the United States Penitentiary at McNeil Island (R. 12, 14). The order of revocation was made at a term of court subsequent to the sentence.

3. On the 21st day of January, 1932, the appellant was summarily brought before the trial court for a hearing "on revocation of probation," without any previous notice thereof having been given the petitioner (R. 15, 19-20). The hearing proceeded forthwith without any written charges filed respecting any violation of probation (R. 66), or oral statement being made of charges constituting a violation of the terms of probation (R. 19), upon the overruling of petitioner's objections to proceeding with the hearing and request for a continuance. The grounds of the objection to proceeding with the hearing and the request for a continuance were that the petitioner was not apprised of the nature and character of the charges, or the nature or cause of the accusations against him, or given reasonable notice of the facts in issue, and that no reasonable opportunity had been afforded him to consult counsel or prepare a defense (R. 20-21).

The court, in overruling the objections of the appellant, and in denying his request for a continuance, stated that the newspapers had contained accounts reflecting upon the appellant and "we are here now to investigate. I don't feel it is a matter in the nature of a trial, and, inasmuch as the matter has been brewing for several days, and the defendant himself might have anticipated such a proceeding, I see no harm in going ahead with the proceedings necessary to determine the question before the court" (R. 21-22). This statement of the court was the only notice to petitioner of the question that was before the court for determination and related to what became known as the publicized Doolan incident, but which was not the ground upon which the trial court revoked the probation, and regarding which the Circuit Court of Appeals said, "We have thus far refrained from mentioning another subject of inquiry before the court at the time of the proceedings looking toward the revocation of probation, for the reason that the order is not predicated from the evidence thus adduced" (R. 84).

The trial court's order of revocation was, as stated by the Circuit Court of Appeals, based upon testimony relating to the petitioner's frequent absences from the County Jail in custody of a United States Marshall (R. 84).

There was no notice to the petitioner or the slightest intimation by either the United States Attorney or the court that these jail absences occurring months earlier would be urged as a ground for revocation of his probation; and respecting which the court and the United States Attorney had not seen fit to take any action, although investigated by the Special Agents of the

United States and reported by them in writing more than six months previous to the hearing (Gov. Ex. No. 1, dated Aug. 19, 1931; R. 23).

The Circuit Court of Appeals also held that the order of revocation was *not* based upon a technical escape, "but upon the fact that the appellant had not acted in good faith in carrying out the order of the trial court, but, on the contrary had taken advantage of a general permit to carry out his own purposes quite independently of the basis and theory upon which the order was given" (R. 84).

4. The evidence disclosed that upon the hearing one A. P. Rumberg, Special Agent of the United States Department of Justice, testified that he saw the petitioner on August 18th, 1931, at petitioner's home (R. 22); that on that occasion he ascertained from United States Deputy Marshal Lessner that United States District Judge James had authorized petitioner's release for the purpose of taking him to a dentist for treatments; that the order was in writing, dated May 8th, 1931; that at the time of the visit to petitioner's house on August 18th, the Deputy Marshal stated that he had taken the petitioner from the county jail by an order of the United States District Court (R. 27-28); that the Deputy Marshal stated that he had taken the petitioner "to the dentist on occasions since the order was written" (R. 27-28); the Special Agent further testified that he caused an investigation to be made of the county jail records to ascertain the number of times the petitioner had been released from the county jail (R. 22-23). This investigation was made by J. W. Ghoslin, special agent of the Bureau of

Prohibition, who was not a witness; the results of his investigation being reduced to writing and filed as a report with the agent in charge. This report, over objections, was received in evidence as Exhibit No. 1 and stated that the records of the county jail reflected that petitioner had been taken from the county jail on fifteen occasions, i.e., five in May, four in June, three in July and three in August, 1931, upon the authority of Judge James, and in custody of the United States Deputy Marshal, Henry Lessner, with the exception of one occasion when he was in custody of United States Deputy Marshal Jones, and that he was out of jail for several hours on each of said days.

After a limited cross-examination, the court interrupted the question partially formulated by counsel to conduct an examination of his own of the witness. Upon the conclusion of the court's examination, when counsel attempted to continue his cross-examination, the court dismissed the witness with the statement: "We are not conducting a trial," and denied the right of further cross-examination, to which action of the court an exception was noted (R. 30).

R. L. Zimmerman, Clerk of the Court, testified that while it was the usual practice when a prisoner is authorized to be released from the county jail, for such fact to appear on his records, his records did not disclose that any authorization was granted to take the petitioner from the county jail (R. 32).

5. James E. Burns, the petitioner, testified in his own behalf that he was an inmate of the county jail, serving his sentence on Count I of the indictment; that he was

one of the trusties in the jail, having been designated as such because of meritorious conduct; that he had a lot of bad teeth and that there were no facilities in the jail for doing dental work (R. 41); that his attorney, Ames Peterson, obtained an order from United States District Judge James that he might be taken in custody of the United States Marshal for treatments to a dentist; that he had a lot of work done on his teeth, and that the work was not yet finished (R. 41-42); that he went to his home several times after visiting the dentist but not every time (R. 44-47); that when he was out he asked to be taken home to get a change of clothes and that usually each time he went to his home he went for a change of linen (R. 48). He further testified that he could not phone the dentist from the jail (R. 46); that there was considerable confusion in making and keeping appointments with the dentist because the deputy marshal's duties were such that he could not always comply with the appointment as made with the dentist on the occasion of the previous visit (R. 47).

6. At the conclusion of the petitioner's testimony counsel asked for an opportunity to present further evidence on behalf of the petitioner, i.e., the testimony of the dentist, the orders of the court authorizing the petitioner's release from the county jail, etc. The request was denied, the court saying: "I am not prepared to have a hearing in this case that will run to the proportions of a criminal trial" (R. 49). An exception was taken to this ruling of the court.

7. Upon this evidence the court revoked the probation granted the petitioner, for the reason that probation had

been granted during the "good behavior" of the petitioner, and that it appeared from the evidence "that the spirit of probation" had not been complied with. To these findings and order of the court revoking probation, the petitioner took an exception (R. 50).

The Questions Presented

The Circuit Court of Appeals held that proceedings to revoke probation were summary, following that line of state decisions holding that the granting of probation is an act of grace which may be summarily revoked at any time, and overruling the conclusions reached in *U. S. vs. Hollandsworth*, 34 Fed. (2) 423, 427 (C. C. A. 4), and that line of state decisions in which it is held that the probationer is entitled to notice of the charge and to a hearing upon the charge against him and that the order of probation can only be revoked upon cause thus shown, i.e., that the cause must be either a violation of the law or of the terms of the order granting probation, or the instructions issued in pursuance thereof.

1. The question thus arises whether a probationer is entitled to a "judicial hearing," in accordance with the established rules of "judicial procedure," i.e., notice of the specific charge, a reasonable opportunity to prepare his defense, a reasonable opportunity of cross-examination, and a reasonable opportunity to call witnesses in his own behalf.

2. The question also arises whether probation can be revoked upon a finding by the court that the probationer has not acted in "good faith" and "the spirit of probation was not complied with," in the absence of a showing

that the probationer violated the law, or the terms of the order granting probation, or the instructions issued in pursuance thereof.

REASONS FOR GRANTING THE WRIT

I.

The Circuit Court of Appeals Has Decided a Question of Substance Relating to the Construction of a Statute of the United States Which Has Not Been, But Should Be, Settled By This Court.

1. The Circuit Court of Appeals in effect held that proceedings to revoke probation under the *Probation Act* (18 U. S. C. A., Secs. 724-727, 43 Stat. 1259, Secs. 1-4) are "summary" and that no specific charge need be filed or made against the probationer, nor judicial hearing granted in accordance with the established rules of judicial procedure. This court has never yet passed upon the question of the applicable procedure in revocation proceedings under the probation statute, nor settled the question of the rights, if any, of a probationer to notice of the specific charge of violation of his probation, and obviously ought to do so.

2. The Circuit Court of Appeals held that probation is an act of grace which may be summarily revoked at any time and that Congress "has attached no condition whatever to such revocation," and that probation may be revoked regardless of the absence of any showing of violation of the law, or of the terms of the order granting probation, or the instructions issued in pursuance thereof. This court has never yet passed upon the question of the power of the court to revoke probation where

there has been a compliance with the specified terms and conditions of the order granting probation, and obviously ought to do so.

The Probation Act is printed as an appendix hereto.

II.

The Circuit Court of Appeals Has Decided Important Matters Which Conflict With the Decisions of Other Circuit Courts of Appeals on the Same Matter.

The holdings of the Circuit Court of Appeals set forth above under the caption "Reasons For Granting the Writ" (which in the interest of brevity are not repeated here), are apparently in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Hollandsworth vs. U. S.*, 234 Fed. (2) 423, 427. In the *Hollandsworth* case the various sections of the Probation Act were construed; the Circuit Court of Appeals holding that the probationer could not be sentenced until he had been given notice of the *specific* charge, and an opportunity to be heard in his defense, "and until the court, upon hearing, shall have *judicially* determined that his conduct during the probationary period has not conformed" to the terms and conditions set out in the order of probation. The Circuit Court of Appeals neither distinguished nor commented on the foregoing decision of the Circuit Court of Appeals for the Fourth Circuit, although apparently directly contrary to their announced views. The court, in the *Hollandsworth* case, supra, in a footnote, states that the rule announced by them is one adopted in most jurisdictions where similar questions

have arisen under state probation laws, and cites numerous supporting state cases at page 428. It is also in conflict with the concurring opinion in the case of *Riggs v. U. S.*, 14 Fed. (2d) 5, 10 (C. C. A. 4), and *Furrow v. U. S.*, 46 Fed. (2d) 647, of the same Circuit.

The petitioner respectfully represents that accompanying this petition, and as an exhibit thereto, is a certified copy of the transcript of the entire record in the case, including the proceedings in the Circuit Court of Appeals for the Ninth Circuit.

WHEREFORE, it is respectfully submitted that this petition should be granted.

OTTO CHRISTENSEN,
Attorney for Petitioner.

CERTIFICATE OF VERIFICATION

STATE OF CALIFORNIA,
County of Los Angeles—ss.

OTTO CHRISTENSEN, being first duly sworn, deposes and says: That he is counsel for JIMMIE BURNS, Petitioner in the within and foregoing action; that he prepared the within Petition and that the matters and things therein are true as he verily believes, and that the same is not interposed for the purpose of delay.

.....

Counsel.

Subscribed and sworn to before me this.....day of September, 1932.

(SEAL) .....

Notary Public in and for the County and State Aforesaid.

In the Supreme Court

OF THE

United States

.....Term.....

JIMMIE BURNS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION

I.

OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals is printed in the Record at pages 73 to 90.

Jurisdiction

The judgment of the Circuit Court of Appeals was rendered on June 20th, 1932 (R. 90). This court has jurisdiction under Section 240 (a) of the *Judicial Code* as amended by the Act of February 13, 1925, 43 *Stat.* 936.

Statement

A full statement appears in the petition, and in the interest of brevity is not repeated here.

Specifications of Error

1. The Circuit Court of Appeals erred in holding that the District Court had committed no error in proceeding with the hearing of an oral motion to revoke the petitioner's probation, over his objection, and in denying his request for a reasonable continuance. The grounds of said objection and motion for a continuance, and the grounds of said error in overruling said objection and motion for a continuance, were, and are, that the defendant was summarily brought before the court on the afternoon of January 21st, 1932, without any previous notice of the character of the proceedings, or the charges that would then and there be made against him, and that he was, therefore, unprepared to properly present his defense (R. 15, 19-22).

2. The Circuit Court of Appeals erred in holding that the District Court had committed no error in summarily proceeding to hear an oral motion to revoke the probation of the defendant in the absence of any previous notice given to him of such proceedings, over his objection that he was not informed (either orally or in writing) of the nature and cause of the accusations against him, or given reasonable notice of the specific charge of violation of the conditions of probation so as to enable him properly to prepare his defense (R. 15, 19-22).

3. The Circuit Court of Appeals erred in holding that the District Court committed no error in refusing the petitioner's request for a reasonable opportunity to pro-

duce evidence and witnesses to rebut the testimony of the plaintiff where the court summarily proceeded with the hearing to revoke probation when the petitioner had not been previously apprised of the specific charges of violation of the terms of his probation (R. 48-50).

4. The Circuit Court of Appeals erred in holding that the District Court committed no error in revoking petitioner's probation, although the matters and things established by the evidence did not constitute a violation of any of the conditions of the order of probation (R. 50).

5. The Circuit Court of Appeals erred in holding that the District Court had committed no error in revoking petitioner's probation, notwithstanding that the evidence failed to establish that any of the specified conditions of the order of probation had been violated (R. 50).

ARGUMENT

I.

One Who Is Granted Probation During Compliance With Specified Terms and Conditions Has a Right to Notice of the Specific Charge of Violations Thereof and to a Hearing as to Whether or Not He Has Violated the Conditions Imposed, According to Some Well Recognized and Established Rules of Judicial Procedure, and Only After Such a Hearing Can the Probation Granted Be Revoked, and Then Only for a Violation of the Law or of the Terms of the Order Granting Probation.

For the convenience of the court the pertinent sections of the Probation Act (18 U. S. C. A., Secs. 724, 725, 727, 43 Stat. 1259, 1260, Secs. 1, 2, 4) are printed as an Appendix hereto.

In interpreting the Probation Act, the Circuit Court of Appeals in the case of *Hollandsworth vs. U. S.*, 34 Fed. (2d) 423, 427 (C. C. A. 4), held that the power of the trial court to revoke a probation and sentence the probationer "may not be exercised unless it is made to appear that he has failed to comply with the terms and conditions prescribed for him"; also that this power may not be exercised until the probationer "has been given notice of the specific charge and an opportunity to be heard in his defense, and until the court, upon a hearing, shall have judicially determined that his conduct during the probationary period has not conformed to the course outlined in the order of probation."

The Circuit Court of Appeals in the *Hollandsworth* case, supra, in a footnote at page 428, states that the foregoing rule is one adopted in most jurisdictions where similar questions have arisen under state probation laws, and cites numerous supporting state cases.

In the case of *Riggs vs. U. S.*, 14 Fed. (2d) 5, (C. C. A. 4), Judge McDowell, in a concurring opinion, at page 10, in construing the statute, said:

> "The fact that the conditions of probation are expressly required by the statute to be put in writing, and a copy thereof furnished to each probationer, most clearly implies that probation may not be revoked unless a condition of the probation has been broken * * * That which is certainly implied in a statute is as binding as that which is expressed. That the probation statute was not intended to give the courts an arbitrary power of revocation seems a necessary conclusion. Treating as a whole the express power to revoke and the implied restriction, the

result is that the statute contains a grant of power to revoke because of a breach of a condition of probation, and does not grant power to revoke merely because a charge has been made that the probationer has broken a condition."

In 54 *A. L. R.* 1471, it is stated:

"In nearly every jurisdiction wherein the question has been raised, it has been held that a convicted defendant, released under a suspended sentence, is entitled to notice and a hearing on the issue whether he has broken the conditions of the suspension of sentence, before the suspension may be revoked."

In the case of *State vs. Zolantakis*, 259 Pac. 1044 (Utah), 54 A. L. R. 1463, the court had before it for consideration the probation statute of Utah, which is substantially similar to the Federal Probation Act, and in which case similar questions as here presented were before the court. The majority of the court were of the opinion that the probationer was entitled to have filed either an affidavit, motion, or other written pleading, setting forth the facts relied upon for a revocation of the probationary order and a hearing upon the question of whether or not he has complied with the conditions imposed.

The Circuit Court of Appeals in the instant case held that the trial court was correct in its opinion that the proceedings were summary and cites the cases of *U. S. v. Mulligan*, 48 Fed. (2d) 93, 94 (C. C. A. 2) and *Furrow vs. U. S.*, 46 Fed. (2d) 647 (C. C. A. 4). The passage cited from the *Mulligan* case is as follows:

"The act itself has no express restrictions on the power to revoke the probation or to modify the

> terms, conditions, or time thereof. These are matters for the exercise of a sound judicial discretion. The remedy for an abuse of such discretion or for other irregularities or errors in the exercise of the jurisdiction is solely by appeal, not by writ of habeas corpus."

The questions here presented were not before the Second Circuit in the *Mulligan* case by appeal, but were in part attempted to be presented on an appeal from an order denying a writ or habeas corpus.

The *Furrow* case (which is incorrectly cited in the opinion as being in the Second Circuit) is entirely in harmony with the previous opinion of the Fourth Circuit in the *Hollandsworth* case, and holds that the action of the trial court was in accordance with its views stated in the *Hollandsworth* case. The court held that the appellant had actual notice of the charges against him (although not in writing), and unnecessarily delayed making his motion for a written notice of the charges; that he was clearly not taken by surprise and was accorded every opportunity to defend himself as to the charges. The Circuit Court of Appeals said:

> "While it would perhaps be the better practice to give one charged with a violation of probation notice in writing as to the charges against him, yet in this case it is not necessary to decide the question as to whether the notice should be in writing, as the motion for a written notice of the charges came too late."

In the instant case, the record discloses that the petitioner was not advised of any fact relied upon by the

plaintiff until the evidence was received at the time of the hearing. He had, upon being summarily brought before the court, objected to the proceedings because he knew nothing of the character of the proceeding, other than that there was "a proceeding pending here with reference to a judgment and sentence of this court, wherein this court placed him on probation * * * and that an effort is being made now to present facts to the court * * * which may lead to a revocation of that order," and as to what "the issues are that are involved, I don't know" (R. 19-22). The court was then on notice as to the dilemma of both the petitioner and his counsel as to what issues they were called upon to meet, and should have directed the United States Attorney, if not in writing, to at least orally state what they proposed to charge as constituting violations of the conditions of probation, and then granted the defendant a reasonable continuance to enable him to prepare his defense.

The court's action in proceeding summarily, is attributable directly to his viewpoint that it was not "a matter in the nature of a trial" and "we are here now to investigate" (R. 21). That the court had fully in mind the character of objection being made by counsel and that it was addressed to a lack of notice of the nature and character of the charges the petitioner would have to meet, and that he was not advised of the facts in issue, is made clear from the court's own statement, in denying the objections to proceeding with the hearing and in overruling the motion for continuance, that the newspapers for several days had carried accounts reflecting in a serious degree upon the defendant. The court's reference to the newspapers had no relationship to the jail

absences of the petitioner, for that occurred some six months previous and could only have reference to the alleged Doolan incident which the trial court in its findings revoking probation, as well as the Circuit Court of Appeals in its opinion, held was not the ground of revocation.

We may well surmise what the evidence on the hearing would have disclosed had the petitioner been put on notice in advance of the hearing that the plaintiff charged him with having been illegally absent from the county jail. The petitioner would then have been in a position to have produced the Deputy United States Marshals as witnesses to explain their actions when they had him in custody, produced the orders under which the Marshals acted, and the dentist to show the character and condition of the petitioner's teeth and the nature and extent of the treatments. This evidence would have established considerable time spent on each occasion at the dentist's office; that the deputy marshals had numerous official papers to serve daily and did serve and discharge their official duties in transit to and from the dentist's office, and that at all times and in all respects the petitioner was under the direction of the said United States Marshals and did not act as a free-will agent during his absences from jail. Not having notice of any specific charges, the petitioner, on the conclusion of the Government's case and of his own testimony, took the only legal as well as logical step left for him to pursue, by requesting the court for a reasonable continuance to enable him to produce the foregoing witnesses and evidence (R. 49-50).

II.

The Important Question of Whether or Not Probation Can Be Revoked for Causes Other Than a Violation of the Terms of the Order Granting Probation Has Not Been, But Should Be, Passed Upon By This Court.

The Circuit Court of Appeals held that the Probation Act recognized "the inherent power of the court to revoke its order suspending the imposition or execution of the sentence" and that Congress "attached no condition whatever to such revocation" (R. 87). This holding by the Circuit Court of Appeals is directly in conflict with the opinions of the Circuit Court of Appeals of the Fourth Circuit in the cases of *Hollandsworth*, supra, and *Furrow*, supra, which are the only cases that we have been able to find reaching a Circuit Court of Appeals upon an *appeal* from an order revoking probation.

The lower court did not revoke petitioner's probation because he had violated any law, but because the petitioner had not complied with the "spirit of probation." Concerning his conduct in carrying out the order of the Judge respecting dental treatments (R. 28), the Circuit Court of Appeals found that the order of revocation was not based upon a violation of law, i.e., a technical escape, "but upon the fact that the appellant had not acted in good faith in carrying out the order of the trial judge, but, * * * had taken advantage of a general permit to carry out his own purposes quite independently of the basis and theory upon which the order was given" (R. 84); and this justified the court in revoking probation

regardless of whether or not it constituted a violation of the terms of the order granting probation.

The judgment of the court granting petitioner probation contains three specific conditions: (a) That he report in writing every three months to the probation officer of the court; (b) that he "entirely refrain from the violation of any law with the possible exception of parking or traffic ordinances," and (c) that he conduct himself as a "law abiding citizen" (R. 9).

There was no question in the case concerning condition "a." We contended in the court of appeals that condition "c", requiring the petitioner to conduct himself as a law abiding citizen, placed no inhibition against the defendant not already placed there by condition "b," which required him to "refrain from the violation of any law."

We urged upon the Circuit Court of Appeals at length that the evidence did not disclose that the petitioner had violated any law. The evidence failed to disclose any law violation on the part of the petitioner. Thus the question for decision by the Circuit Court of Appeals was whether or not a court can revoke probation for causes other than a violation of the specified conditions and terms of probation, and which question was decided adversely to the petitioner. There are numerous state cases which support the conclusions reached by the Circuit Court of Appeals for the Fourth Circuit in the *Hollandsworth* and *Furrow* cases, supra. They are:

State vs. Hardin, 183 N. C. 815, 818;
Williams v. State, 162 Ga. 815, 818;
State v. Zolantakis, 259 Pac. 1044 (Utah), 54 A. L. R. 1463;

Ex parte Lucero, 23 N. M. 433, L. R. A. 1918-C, 549;
Ex parte Hamm, 24 N. M. 33, L. R. A. 1918-D 694;
State v. Miller, 122 S. C. 468.

In the case of *Campbell v. Aderhold*, 38 Fed. (2d) 366, 367, on an application for a writ of habeas corpus, the District Judge said:

> "The conditions of probation ought to be definite and made plain to the probationer, and revocation ought not to be capriciously had if these conditions are observed."

Conclusion

Petitioner now stands committed to the penitentiary serving the five-year sentence originally imposed by the court. What the Circuit Court of Appeals in *U. S. vs. Antinori*, 59 Fed. (2d) 171, 172 (C. C. A. 5) said is unquestionably true of this severe sentence originally imposed by the court. In that case the court said:

> "In imposing sentences that are suspended, courts are apt to make the term of imprisonment longer, in order to make the threat more potent, than if the sentence were to be immediately served."

It is greatly desirable that this court settle the important questions of procedure on an application to revoke probation, as well as the important question of the court's power to revoke probation, in the absence of a showing of violation of the law or of the conditions and terms of the order granting probation. Because this court has never decided the questions here presented, and because the present decision conflicts with the decisions of

other Circuit Courts of Appeals, and for all the other grounds hereinbefore set forth, it is respectfully submitted that the petition for a writ of certiorari should be granted.

OTTO CHRISTENSEN,
Attorney for Petitioner.

APPENDIX

United States Code (Compact Edition)
Secs. 724-725-727

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§724. SUSPENSION OF IMPOSITION OR EXECUTION OF SENTENCES AND PLACING OF DEFENDANT UPON PROBATION; POWER OF COURTS; REVOCATION OR MODIFICATION OF PROBATION; DUTIES OF PROBATIONER. The courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and *upon such terms and conditions as they may deem best;* or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation. The period of probation, together with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible. (Mar. 4, 1925, c. 521, § 1, 43 Stat. 1259.)

§725. SAME; POWERS OF PROBATION OFFICERS; ARREST OF PROBATIONER. When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed. (Mar. 4, 1925, c. 521, § 2, 43 Stat. 1260.)

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§727. SAME; DUTIES OF PROBATION OFFICERS. It shall be the duty of a probation officer to investigate any case referred to him for investigation by the court in which he is serving and to report thereon to the court. The probation officer shall furnish to each person released on probation under his supervision *a written statement of the conditions of probation* and shall instruct him regarding the same. Such officer shall keep informed concerning the conduct and condition of each person on probation under his supervision and shall report thereon to

the court placing such person on probation. Such officer shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid persons on probation and to bring about improvements in their conduct and condition. Each officer shall keep records of his work; shall keep accurate and complete accounts of all moneys collected from persons under his supervision; shall give receipts therefor, and shall make at least monthly returns thereof; shall make such reports to the Attorney General as he may at any time require; and shall perform such other duties as the court may direct. A probation officer shall have the power of arrest that is now exercised by a deputy marshal. (Mar. 4, 1925, c. 521, § 4, 43 Stat. 1260.)